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Attorneys for Plaintiff Pebble Limited Partnership

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

PEBBLE LIMITED PARTNERSHIP,

Plaintiff,

vs.

ENVIRONMENTAL PROTECTION
AGENCY, *et al.*

Defendants.

**SUR-REPLY TO ADDRESS
DEFENDANTS' RELIANCE ON THE
"PRESUMPTION OF
REGULARITY"**

**CIVIL ACTION NO.
3:14-cv-00171-HRH**

/

I. Introduction

Defendants' Reply, Docket No. 107, raises a new point that they never advanced previously—that EPA's actions must be "accorded a presumption of regularity," *id.* at 6, such that the Court should wholly disregard Plaintiff's claim that the so-called "lengthy and meaningful involvement," *id.* at 2, that EPA purportedly permitted Plaintiff to have in the § 404(c) proceedings *and* in the Bristol Bay Watershed Assessment was pretextual. Contrary to Defendants' argument, however, the "presumption of regularity" applies only when there have been no alleged procedural irregularities.¹ *See Yates v. Aurora Loan Servs., LLC*, No. C-11-00695, 2011 WL 2429376, at *5 (N.D. Cal. June 13, 2011) (dismissing action because "Plaintiffs have not made any allegations of procedural irregularities to overcome the presumption of regularity"). This case is all about procedural irregularities—violations of the Federal Advisory Committee Act, which sets forth procedures meant to guarantee openness, transparency, public participation, fair balance, and unbiased proposals in connection with the work of advisory committees. The presumption of regularity has no place in a case in which federal officials have consistently behaved in a manner that is wholly inconsistent with due process and fair dealing or in a case in which an agency's claim that it has remained open and even-handed regarding its decision on a critical issue is patently untrue and belied by the record. In that regard, nothing that the EPA officials allegedly did in this case should enjoy any presumption of regularity. In short, Plaintiff's allegations are more than sufficient to show that Plaintiff was injured by the

¹ Furthermore, a plaintiff need not present evidence at the pleading stage to overcome the presumption; allegations alone are sufficient. *See Shambour v. Carver County*, Civ. No. 14-566, 2014 WL 3908334, at *4 n.3 (D. Minn. Aug. 11, 2014) (rejecting "presumption of regularity" defense at pleadings stage because the presumption "certainly does not merit dismissing the case before [Plaintiff] has had an opportunity to discover" evidence to overcome the presumption); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (although Secretary of Transportation's decision "is entitled to a presumption of regularity," "that presumption is not to shield his action from a thorough, probing, in-depth review"), *overturned on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *accord Sensible Traffic Alts. & Res., Ltd. v. Fed. Transit Admin.*, 307 F. Supp. 2d 1149, 1169 (D. Haw. 2004).

lack of *genuine* participation in EPA's § 404(c) proceeding and that the "lengthy and meaningful involvement" that Plaintiff supposedly had in that proceeding was a sham.

But, if there were any doubt about that, a new document, produced after Plaintiff filed its opposition papers—not by EPA but by the National Park Service in response to a recent FOIA request—conclusively shows that EPA intended to veto the mine all along. Moreover, this document, in conjunction with other documents that Plaintiff has obtained, establishes both that EPA had decided to proceed with a preemptive veto well before the Alaskan Tribes "petitioned" the agency and that EPA reached that decision only after engaging in secretive consultations with outside individuals and organizations (the very ones that eventually coalesced into the Anti-Mine Coalition) that have been vehemently opposed to any mining in the Bristol Bay Watershed. In short, by the time Plaintiff and other mine supporters were permitted to have their say, the fix was in, and nothing that Plaintiff could say or do would change the outcome. EPA's purportedly allowing Plaintiff to "participate" in the process, therefore, was no cure; it was a hollow gesture.

II. EPA's Newly Produced "Options Paper"

Defendants' position in this case has consistently been that EPA was (and still is) open-minded about whether a § 404(c) veto is appropriate and that no decision had been made to proceed under § 404(c) until the Bristol Bay Watershed Assessment was completed. Plaintiff's FOIA requests have caused EPA to produce several documents that show, circumstantially and otherwise, that EPA's position is simply not supportable and that the agency's decision to proceed with a § 404(c) veto had been made well before the BBWA was completed (perhaps even before it was ever contemplated). Plaintiff has alleged precisely that in this case, and that is enough to show injury.

After Plaintiff filed its opposition to Defendants' motion to dismiss, however, the National Park Service, in response to a FOIA request, produced an email dated July 1, 2010, from EPA Region 10's Patricia McGrath to her EPA colleague Phil North to which a document entitled "Options for EPA Involvement in Mining Activity in the Bristol Bay Watershed June 8, 2010" is attached (Attached as Ex. 1 (July 1, 2010, email from P. McGrath to P. North)). After setting forth the background of the Pebble Mine controversy, the "Options Paper" lays out three alternative scenarios for invoking § 404(c): (1) wait until after Plaintiff submits its § 404 permit applications to initiate a § 404(c) proceeding, Options Paper at 3; (2) develop an "informal evaluation and record for potential 404(c) determination," *id.* at 5; and (3) initiate a § 404(c) proceeding immediately, without waiting for a permit application, *id.* at 6. The Options Paper, which had gone through a long and elaborate drafting process over the course of several months, does not expressly recommend which of these alternatives should be selected. But one thing is clear: the EPA officials involved had already made the decision that the Pebble Mine should be prohibited under § 404(c). Nowhere in the Options Paper does EPA even suggest that one of the options would be to approve a § 404 permit on terms that Plaintiff may seek. EPA, therefore, did not have an open mind on this issue. The officials responsible for initiating § 404(c) proceedings in Region 10 had made up their minds—a veto was going to happen at some point; the only question was when and how. Indeed, it is now clearer than ever that Phil North and his colleagues in Region 10's Aquatic Resources Unit were strongly in favor of the third option, acting immediately and before any permit application was submitted: "Waiting to make the determination does not seem necessary or a prudent use of anyone's resources." *Id.* at 5. (Of course, as it turns out, the third option is exactly what EPA selected, perhaps because, in the words of the Options Paper, it would (in contrast to the other options) "allow[] EPA to

adequately quality control information that supports decision making.” *Id.* at 7 (setting forth various “Pros”). Put succinctly, the die had been cast, and the BBWA and Plaintiff’s “lengthy and meaningful involvement” were nothing more than window dressing—very expensive window dressing, to be sure, but window dressing just the same.

To make matters much worse, the record now shows something that was only suspected previously: this Options Paper was shared with a member of the Anti-Mine Coalition, Jeff Parker (counsel for the tribes, Trout Unlimited, and the Alaska Independent Fishermen’s Marketing Association), while it was being prepared, and, based on the information that EPA has produced to date,² it appears that Parker had substantial input into it. For example, at the same time that EPA officials were commenting on the draft Options Paper, Parker sent an email to Region 10 lead attorney Cara Steiner-Riley and Phil North with the subject “options paper.” (Attached as Ex. 2 (June 29, 2010, email from J. Parker to C. Steiner-Riley and P. North).) Now that Plaintiff has the Options Paper to which Parker’s email referred, the context of this email has become clear. Either Steiner-Riley or North had previously provided a draft of the Options Paper to Parker for his comment, and his June 29, 2010, response was made to that request. Parker’s advice and recommendations were then forwarded by North on the same day to EPA’s Michael Szerlog, the text of which EPA redacted in the version produced under FOIA. (Attached as Ex. 3 (June 29, 2010, email from P. North to M. Szerlog).) Later that same evening, Parker sent another email to North, with a subject line that reads “an idea.” Parker states that “you could separate options into ‘procedural’ options and ‘substantive’ options,” and he attached a grid showing different outcomes for prohibiting and restricting metallic sulfide

² Many documents, such as the Options Paper, were withheld or heavily redacted by EPA under the “deliberative process” exemption to FOIA. There will be an appropriate time to examine why EPA withheld a document based on the deliberative process exemption to FOIA when the lawyer overseeing the FOIA response—the same Steiner-Riley who was communicating in 2010 with outsiders about the Options Paper—knew with certainty that the document had been shared outside EPA.

mining and other activities depending on the location of nearby waterways and wetlands. (Attached as Ex. 4 (June 29, 2010, email from J. Parker to P. North).) On the very next evening, North sent an email to several of his EPA colleagues, attaching yet another draft of the Options Paper.³ (Attached as Ex. 5 (June 30, 2010, email from P. North to EPA personnel).) These emails, all obtained before any formal discovery in this case, not only support Plaintiff's allegations that the decision to proceed under § 404(c) was made long before Plaintiff's purportedly "lengthy and meaningful involvement" in the process, but they cement the claim that EPA was utilizing Parker, a lawyer to several members of the Anti-Mine Coalition Advisory Committee, on the agency's § 404(c) strategy in violation of FACA.

Defendants argue that none of EPA's back-room dealing with mine opponents matters, because Plaintiff was later given the chance to have "lengthy and meaningful involvement" in the process. That—and there is no other way to put it—is hogwash. The documents, and, in particular, the newly discovered Options Paper, now show conclusively that EPA's course had been definitively charted before Plaintiff was ever invited to the § 404(c) party. At that point, and with the benefit now of seeing these documents, it is apparent that whatever Plaintiff had to say would fall on deaf ears. The only ones whom EPA had any interest in listening to (and the ones that EPA listened to routinely) were the opponents of Pebble Mine, the same ones that eventually came together to form *de facto* federal advisory committees that EPA established or utilized to advise EPA on how to execute a preemptive veto strategy that, as is now clear, those groups helped to design. If that is not cognizable injury to Plaintiff sufficient to give it standing, then nothing is.

³ There is a peculiar open and closed bracket—"[]"—in the "cc" line of this email that suggests that something was redacted or missing from this line.

III. Conclusion

Defendants fail to account for the highly unusual and, quite frankly, highly troubling nature of this case. The manner in which EPA acted here was not how a federal agency regularly acts. Any “presumption of regularity” that EPA and its officials might typically enjoy has no place here whatsoever, and the recently produced Options Paper clinches that point. Defendants’ motion should be denied.

Dated March 16, 2015

Respectfully submitted,

/s/ Thomas Amodio

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CERTIFICATE OF SERVICE

I certify that on this 16th day of March, 2015, I electronically filed a copy of Plaintiff's Sur-Reply to Address Defendants' Reliance on the "Presumption of Regularity" using the CM/ECF system, which will electronically serve counsel for Defendants, RICHARD L. POMEROY, STUART JUSTIN ROBINSON, BRAD P. ROSENBERG, and ROBIN F. THURSTON.

/s/ Timothy Work

EXHIBIT 1

EPA-1093

**Patricia
McGrath/R10/USEPA/US**

07/01/2010 07:02 PM

To Phil North

cc Cara Steiner-Riley, David Allnutt, Linda Anderson-Carnahan,
Marcia Combes, Mary Thiesing, Michael Szerlog, Mike
Bussell, Phil North, Richard Parkin, Sally Thomas, Tami
Fordham

bcc

Subject Re: Bristol Bay Options Paper

Phil -

Attached are my comments. Give me a call if you have questions.

I am planning on attending the RA briefing.

Thanks for asking -

Patty



Bristol Bay Options Paper Final Draft-pm.doc

Phil North

Attached is the latest version of the options page...

06/30/2010 03:49:51 PM

From: Phil North/R10/USEPA/US

To: Cara Steiner-Riley/R10/USEPA/US@EPA, David Allnutt/R10/USEPA/US@EPA, Linda
Anderson-Carnahan/R10/USEPA/US@EPA, Marcia Combes/R10/USEPA/US@EPA, Mary
Thiesing/R10/USEPA/US@EPA, Michael Szerlog/R10/USEPA/US@EPA, Mike
Bussell/R10/USEPA/US@EPA, Patricia McGrath/R10/USEPA/US@EPA, Phil
North/R10/USEPA/US@EPA, Richard Parkin/R10/USEPA/US@EPA, Sally
Thomas/R10/USEPA/US@EPA, Tami Fordham/R10/USEPA/US@EPA

Date: 06/30/2010 03:49 PM

Subject: Bristol Bay Options Paper

Attached is the latest version of the options paper for Bristol Bay/Pebble Mine. The main edits are the addition of a guess at resource needs and the beginning of an information available/data gaps list. If you have edits to suggest please get them back to me as soon as you can.

The only time the RA is available to discuss the options paper before he visits Bristol Bay is Thursday, July 8 at 11:00AM PST. Most of those on the distribution list for this message are not available at that time.

[attachment "Bristol Bay Options Paper Final Draft.doc" deleted by Patricia McGrath/R10/USEPA/US]

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"To protect your rivers, protect your mountains."

**ATTORNEY-CLIENT WORK PRODUCT – NOT SUBJECT TO RELEASE
UNDER FOIA – DELIBERATIVE PROCESS - PREDECISIONAL**

**Options for EPA Involvement in Mining Activity in the Bristol Bay Watershed
June 8, 2010**

I. Issue:

There is a very large copper, molybdenum and gold sulfide ore deposit located at the headwaters of the Koktuli River and Upper Talarik Creek of the Nushagak and Kvichak watersheds of Bristol Bay, in southwestern Alaska. Bristol Bay is arguably the most important watershed in the world for wild salmon. It produces 8% of the world's Pacific Salmon, all of them wild fish. The Nushagak River and Kvichak River watersheds, by themselves, produce ½ of these fish. Bristol Bay has the largest sockeye salmon fishery in the world. The Yupik Alaska Native culture is a salmon-based culture supported by these fish throughout the region. The estimated value of this fishery is approximately \$500 million per year.^{1,2} This is a sustainable resource that has provided for people for thousands of years past and can provide indefinitely into the future if the integrity of the watershed is maintained. These salmon also provide critical support to both the terrestrial ecosystems of the watersheds and the marine ecosystems of the North Pacific Ocean³.

Although the mining company (Pebble Limited Partnership) has not submitted permit applications for developing the ore deposit, it has developed draft mine plans and has provided other information that indicates that if this large ore deposit is developed, it could be one of the largest mines in the world. The ~~with an~~ estimated gross value of the mine could be \$700 billion or \$700 million per year for approximately 100 years. If fully developed it would be 6 to 10 times larger than the Bingham Canyon Mine in Utah, self-reported to be the largest man made excavation on earth.⁴ Mining activity would be comprised of an excavation with a surface foot print of 6 square miles and extraction up to a mile deep, a mill site, a series of transportation-related infrastructure, and 4 to 10+ billion tons of waste stored in impoundments. Thousands of acres of wetlands and tens of miles of streams could be permanently lost during construction of a mine. Pollution from operations following construction could include pipeline spills of metals concentrate, seepage from tailings impoundment and waste rock dumps~~leaks~~. Acid-generating dust and road runoff, if not adequately managed, could impact nearby salmon bearing waters during the effective mine life, which could be 50 to 100+ years. There is also the possibility of shipping-related spills of metals concentrate into marine waters. In the long term the open pit mine and large waste disposal sites would have to be

Comment [PM1]: May want to add the basis for these costs. E.g., based on current metals prices and average copper, gold, moly grades?

¹ Duffield, J.W. et al. 2007. Economics of Wild Salmon Ecosystems: Bristol Bay, Alaska. USDA Forest Service Proceedings RMRS-P-49.

² Alaska Department of Fish and Game. 2009. 2009 Bristol Bay Salmon Season Summary. Alaska Department of Fish and Game, Anchorage, Alaska.

³ National Oceanographic and Atmospheric Administration, Alaska Fisheries Science Center, Seattle, Washington, personal communications with Dr. Sarah Gaichas and Dr. Kerim Aydin by Phil North, March 1, 2010.

⁴ Kennecott Utah Copper web site last accessed May 12, 2010, <http://www.kennecott.com/visitors-center/>

maintained in perpetuity at the top of these ecologically unique watersheds in a seismically active area in the face of climatic uncertainty.

EPA has been advising on the design of environmental baseline studies, along with other federal, state and local agencies, including: US Fish and Wildlife, National Marine Fisheries Service (NMFS), Alaska Department of Fish and Game, Alaska Department of Environmental Conservation, Alaska Department of Natural Resources, and the Corps of Engineers. Based on this involvement, and EPA's review of the existing literature and reports, EPA Region 10, Aquatic Resources Unit believes that:

- 1) Bristol Bay, its watersheds, and aquatic resources are irreplaceable natural and economically essential resources that can provide benefits to countless generations to come; benefits that far exceed those derived from the one time extraction of minerals; and
- 2) That large-scale filling of wetlands and stream channels that support the salmon resources of Bristol Bay and the development of a mine, with associated infrastructure, acid generating waste rock and tailings ponds, poses threats that can significantly and unacceptably damage this unique and essential resource.

As a result, EPA Region 10, Aquatics Resources Unit, staff have identified the Nushagak and Kvichak watersheds of Bristol Bay as candidates for a Section 404(c) prohibition or restriction under the Clean Water Act.

Under Section 404(c) of the Clean Water Act, EPA is authorized "to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and [the Administrator] is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas....The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection."⁵ Although EPA generally waits until a permit application is pending before it makes a 404(c) determination that is neither a requirement nor an intent of the process^{6,7}. EPA can make such a determination before any application is submitted⁸.

If EPA determines, given the information it has at hand, that there is "likely to be" an unacceptable adverse impact to the aquatic ecosystem, then EPA's regulations allow EPA to proceed under Section 404(c) without the permit or NEPA process⁹. Therefore, EPA could choose to "*prohibit* the designation of an area as a disposal site" for any purpose, or it could *restrict* the use of an area as a disposal site for a particular purpose such as the

⁵ 33 U.S.C. § 1344(c)

⁶ Federal Register Vol. 44, No. 50, Pages 14578 through 14579, Tuesday, March 13, 1979, Preamble to the proposed rule: Part 231 – Denial or Restrictions of Disposal Sites – Section 404(c) Procedures.

⁷ Federal Register Vol. 44, No 196, Pages 58076 through 58082, Tuesday, October 9, 1979, Preamble to the final rule: Denial or Restriction of Disposal sites; Section 404(c) Procedures.

⁸ 40 C.F.R. Part 231.1

⁹ 40 C.F.R. Part 231.2(e)

| large-scale mining of sulfide ores, or it could *restrict* the use of an area as a disposal site by placing conditions on disposal, location, etc. that will adequately prevent unacceptable adverse impacts to the resource.

| There is a wide breadth of information already available which identifies potential~~likely~~ adverse impacts from sulfide ore mining. Region 10's Aquatic Resources Unit (ARU) believes that this information, as it relates to Bristol Bay and its watersheds, is sufficient to make a 404(c) determination now. We would like to summarize this information and gather some additional information from NMFS on the aquatic resources, USGS on geochemistry and seismology, and perform further legal analysis on identifying appropriate restricted areas and activities. This additional work will require a commitment of ARU and other Region 10 staff and/or contractor resources and time over the next several months. We believe that this additional information and effort would assist in determining whether a 404(c) determination is appropriate at this time and would save significant resources over the long run. NMFS, NPS and FWS staff in Alaska have unofficially endorsed EPA initiating a 404(c) action.

Comment [PM2]: If unofficial, not sure if it should be mentioned in this paper. Just a question.

Listed below are options for action currently available to EPA, the pros and cons and the resource needs of each option.

II. Options:

1. Participate in a permit and NEPA process as they unfold followed by a 404(c) determination

- a) Clean Water Act Section 404 permit
 - Pebble Limited Partnership (PLP), a company interested in developing this ore body, has said that they expect to submit Clean Water Act (CWA) Section 404 permit applications in 2011.
 - A federal 404 permit is required from the Army Corps of Engineers.
 - EPA's role would be to review the project and comment on its compliance with the 404(b)(1) Guidelines
 - Potential outcomes include:
 1. Provide recommendations on avoidance, minimization and compensatory mitigation for fill discharges.
 2. Include "elevation language" in our comments on the permit public notice that reserves our "rights" to elevate disagreements to higher authority than the Alaska District (404(q)); possibly elevate the permit decision.
 3. Use our 404(c) authority to veto the Corps' 404 permit.
- b) NEPA
 - EPA's role is to review and comment on the technical merit of the EIS and compliance with NEPA regulations.

1. EPA could be a lead or co-lead with the Corps.
- EPA would rate the project according to the quality of the EIS and the environmental impact of the project. EPA could rate the project environmentally unacceptable and recommend that no action be taken.
- EPA would have the option of elevating the Corps' NEPA decision to the Council on Environmental Quality.

Pros:

- The permit and NEPA processes could generate a great deal more detailed environmental information and analysis upon which to base a decision.
- The permit and NEPA processes are public and allow for two comment periods on the scope of the EIS and on the merits of the projects versus potential environmental impacts.
- EPA will maintain its authority for a 404(q) and 404(c) throughout this process.
- EPA may gain more support for a 404(c) position from other agencies and the public as more information would be available about the project and potential impacts.
- Positions EPA to be able to have two opportunities to review and comment on any proposed projects and potentially have more influence on the project design as a cooperating agency.-

Cons:

- The permit and NEPA processes would likely take at least several years to complete.
- The 404(c) regulations recommend that a "q" process be completed before a "c" process is initiated, likely engaging the project team for additional years.
- The EPA has no authority to compel the Corps or the applicant to collect specific information, however, we could become a cooperating or co-lead NEPA agency that could give us more of that authority.
- EPA could be accused of "bad faith" if it chose to pursue a 404(c) action after the permit process had played out
- To negotiate the regulatory process a great deal of human and other resources will be required by all parties involved.
- PLP would likely spend hundreds-tens of millions of dollars on necessary environmental studies.
- The Alaska District Corps office has little experience managing the preparation of EISs.
- We can anticipate that significant Region 10 ARU, ORC, OEA and ERSMU FTE would have to be assigned to this unusually large and complex project for an extended review period.

- EPA Region 10 Aquatic Resources Unit believes that there is already sufficient information to make a recommendation that the Nushagak and Kvichak River watersheds should be restricted for discharge of dredged or fill material. Waiting to make the determination does not seem necessary or a prudent use of anyone's resources.

Estimated Resources Needs: We estimate that the project team (up to six staff) would be engaged for several years to a greater and lesser extent over that time. One each of ERSMU and ARU staff would be involved to a substantial extent over most of that time. Other team members with special technical expertise would be involved as the expertise was needed (weeks at a time).

2. Dedicate resources to developing an informal evaluation and record for potential 404(c) determination

- a) Dedicate staff and contractor time to compile existing information on the Bristol Bay watershed and information relevant to sulfide-ore mining, and to identify any additional analyses that might be needed.
- b) Engage USGS to assist in the analysis and risk assessments of geochemical, hydrogeologic and seismic information existing for the Bristol Bay area.
- c) Engage NOAA and USFWS to assist in the analysis of climate information for Bristol Bay and the ecological implications of fisheries information for Bristol Bay and associated waters (Bering Sea and North Pacific).
- d) Develop a formal impacts evaluation for sulfide ore mining in the Bristol Bay watershed.
- e) Have ORC evaluate the potential for a "takings" claim and assist in evaluating restricted areas or activities.
- f) Move forward with 404(c) determination, if warranted, after additional information is gathered to support EPA's analysis.
- g) Could alternatively enter the NEPA process if/when triggered by a 404 permit application.

Pros:

- Enables EPA to act early if deemed appropriate, saving all involved parties a great deal of time and money.

- Enables EPA to more fully evaluate our options on this high priority issue, before committing to a course of action, while there are no externally imposed time constraints.
- Proactively develops a body of knowledge for all future potential actions in this critical watershed (404 oversight, NEPA review and 404(c)) without causing a political backlash.
- Allows EPA to put the relevant information together and ensure that it is adequately quality assured/quality controlled to support decision making.
- Allows EPA to identify vulnerabilities, both legal and technical, prior to making a recommendation or decision.
- The sooner and more completely this step is done, the fewer long-term EPA resources will be needed.
- Doesn't preclude us taking part in NEPA process in future when triggered by the 404 permit application.

Cons:

- Requires dedication of substantial EPA resources for the next 3 to 6 months.

Estimated Resource Needs: We estimate that 2 FTEs (1 person full time and others for specific parts), plus one attorney part time, to evaluate takings and options for scope of a 404(c) action, would be dedicated to this effort for the next 6 months. In addition, a contract would be established with USGS or an EPA contractor.

3. Initiate 404(c) process – Intent to Issue Notice of Proposed Determination

- a) Send “15 day” letter to Corps of Engineers stating that EPA is considering invoking Section 404(c) of the Clean Water Act.
- b) Initiate discussions with PLP about the risk of adverse effects on the Nushagak and Kvichak watersheds and fisheries. Solicit information from them that would rebut our conclusions.
- c) Initiate government to government consultation with Nushagak and Kvichak tribes about the nature and scope of a 404(c)
- d) Dedicate staff and contractor time to compile existing information on the Bristol Bay watershed and information relevant to sulfide-ore mining, and to identify any additional analyses that might be needed.

- e) Engage USGS to assist in the analysis of geochemical, hydrogeologic and seismic information existing for the Bristol Bay area.
- f) Engage NOAA to assist in the analysis of climate information for Bristol Bay and fisheries information for Bristol Bay and associated waters (Bering Sea and North Pacific).
- g) Develop a formal impacts evaluation for mining in the Bristol Bay watershed.
- h) Have ORC evaluate the potential for a “takings” claim and assist in evaluating restricted areas or activities.

Pros:

- Develops a body of knowledge proactively for all future potential actions (404 oversight, NEPA review and 404(c)), but does not commit to a course of action.
- The burden of proof that the risk of adverse effect is reasonable would be on PLP or any other project proponent.
- Allows EPA to initiate government to government relations with tribes to seek develop an action for the area acceptable to the tribes.
- Allows EPA to adequately quality control information that supports decision making.
- Allows EPA to identify vulnerabilities, both legal and technical, prior to making a recommendation or decision, so that any record can then be developed which will support decision making.
- Allows the development of a proactive public outreach strategy.
- The sooner and more completely this step is done, the fewer long term EPA resources will be needed assuming the outcome is that a 404© action is justified.
- Agencies throughout the federal, state and tribal governments would be relieved of the burden of staffing the long term effort of NEPA, Section 7 consultation, and 404 review and various state laws and programs.
- PLP or any other project proponent could avoid spending ~~tens~~hundreds of millions of dollars on a project EPA ARU program staff believe should be vetoed in the end.
- EPA resources required for relatively shorter period of time, however, see “Cons” below regarding lawsuits.
- If a decision is made to pursue 404(c) then
 - Bristol Bay fisheries and the economies and ecosystems that depend on them would be protected from this source of damage.
 - The wildlife resources dependent on Bristol Bay would be protected from this source of damage.

Comment [PM3]: Not sure what this means.

Cons:

- EPA will become the target of inevitable lawsuits from the State of Alaska, PLP (or another project proponent), and others.
- This will require legal analysis of takings issues.
- EPA will be accused of killing the project before the permit applications are submitted and NEPA environmental impacts analysis is performed.
- Requires dedication of substantial EPA resources for the next 1 to 2 years.

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Estimated Resource Needs: We estimate that 2 FTEs would be required for 1 to 2 years, plus attorneys, OEA staff, outreach staff and others with specific expertise at specific times (weeks at a time).

Currently identified information and data gaps:

We have the ability to predict environmental impacts of
Available information

- Fisheries information is readily available from Alaska Department of Fish and Game and other sources. This includes subsistence, commercial and sport fisheries.
- ~~Waste system reliability studies by environmentally oriented consultants (Kuipers and Maest).~~
- Tailings dam reliability studies by the United Nations, industry and others.
- Acid generation and control descriptions by EPA and others.
- Limited acid generation potential of the ore body is available from PLP in the form of two charts with data points.

Comment [PM4]: I deleted this since this study was done for an environmental group and is not without bias.

Data gaps and needed analysis

- Geochemistry, as noted above, is limited.
- Hydrogeology
- Seismology
- Climate change
- NMFS has provided a limited analysis of the role of Bristol Bay salmon in the North Pacific ecosystem. An expanded and more detailed description would be helpful.
- Tailings dam failure risk over time into perpetuity under combined disturbance scenarios of weather and seismicity.
- We have no information on how PLP would close the tailings impoundment (whether it would be water retaining or dry); therefore difficult to determine potential long-term impacts.
- Failure rates of concentrate pipelines.

Formatted: Bullets and Numbering

EXHIBIT 2

To: Cara Steiner-Riley/R10/USEPA/US@EPA[]
Cc: Phil North/R10/USEPA/US@EPA[]
From: "jeff parker"
Sent: Tue 6/29/2010 5:32:38 AM
Subject: options paper
<http://dnr.alaska.gov/mlw/mining/largemine/pebble/waterapp.htm>

Cara,

One option that EPA might consider is to commence a 404(c) process based on the 2006 applications. Here is a link to the 2006 applications: <http://dnr.alaska.gov/mlw/mining/largemine/pebble/waterapp.htm>

EPA could ask PLP for any updated designs (even though they presumably might not be final), and proceed based on the 2006 applications and whatever PLP provides in the way of additional designs, if any.

This has advantages. It is similar to Bayou Aux Carps, where there had been designs but no application was then pending. And it has advantages in the event that PLP challenges any 404(c).

I am available tomorrow to discuss this if you wish, and I leave for Montana for 10 days on Wed. AM.

Jeff

EXHIBIT 3

EPA-3338

Phil North/R10/USEPA/US

06/29/2010 01:23 PM

To Michael Szerlog

cc

bcc

Subject Fw: options paper

[REDACTED]

Phil

Phillip North
Environmental Protection Agency
Kenai River Center
514 Funny River Road
Soldotna, Alaska 99669
(907) 714-2483
fax 260-5992
north.phil@epa.gov

"To protect your rivers, protect your mountains."

----- Forwarded by Phil North/R10/USEPA/US on 06/29/2010 09:23 AM -----

From: "jeff parker" <gparker@alaska.net>
To: Cara Steiner-Riley/R10/USEPA/US@EPA
Cc: Phil North/R10/USEPA/US@EPA
Date: 06/28/2010 09:32 PM
Subject: options paper

Cara,

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EPA could ask PLP for any updated designs (even though they presumably might not be final), and proceed based on the 2006 applications and whatever PLP provides in the way of additional designs, if any.

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Jeff

EXHIBIT 4

To: Phil North/R10/USEPA/US@EPA[]
From: "jeff parker"
Sent: Tue 6/29/2010 10:31:36 PM
Subject: an idea
[grid of prohibit vs restrict by locale by activity-2.doc](#)

Phil,

See if this helps.

Jeff

You could separate options into “procedural” options and “substantive” options. This identifies a “substantive” option.

**404(c) Substantive Option:
Geographic Area by Type of Activity**

	Metallic sulfide mining	Activities other than metallic sulfide mining
Zone 1 (probably less than a million acres): Land inside exterior boundaries drawn to encompass waters and wetlands that may be used as discharge sites of dredged or fill material associated with metallic sulfide mining (including Pebble & facilities (road, millsite, etc), and perhaps Kemuk & facilities)	404(c) Action: EPA could prohibit discharge of dredged or fill material associated with metallic sulfide mining.	404(c) Action: EPA could restrict discharge of dredged or fill material associated with activities other than metallic sulfide mining, and does so based on some sort of compatibility test similar to a refuge compatibility test, but tailored to 404(c) concerns.
Zone 2 (probably about 5 million acres surrounding land within Zone 1): Land outside exterior boundary describe above but inside exterior boundary of latest draft refuge map of Kvichak and Nushagak drainages (about 6 million acres).	404(c) Action: EPA could take a position that in the event of discovery of metallic sulfide deposits, EPA will evaluate for purposes of future 404(c) action.	404(c) Action (same as above): EPA could restrict discharge of dredged or fill material associated with activities other than metallic sulfide mining. EPA does so based on some sort of compatibility test, similar to a refuge compatibility test, but tailored to 404(c) concerns.

EXHIBIT 5

To: CN=Cara Steiner-Riley/OU=R10/O=USEPA/C=US@EPA;CN=David
 Allnutt/OU=R10/O=USEPA/C=US@EPA;CN=Linda Anderson-
 Carnahan/OU=R10/O=USEPA/C=US@EPA;CN=Marcia
 Combes/OU=R10/O=USEPA/C=US@EPA;CN=Mary
 Thiesing/OU=R10/O=USEPA/C=US@EPA;CN=Michael
 Szerlog/OU=R10/O=USEPA/C=US@EPA;CN=Mike
 Bussell/OU=R10/O=USEPA/C=US@EPA;CN=Patricia
 McGrath/OU=R10/O=USEPA/C=US@EPA;CN=Phil North/OU=R10/O=USEPA/C=US@EPA;CN=Richard
 Parkin/OU=R10/O=USEPA/C=US@EPA;CN=Sally Thomas/OU=R10/O=USEPA/C=US@EPA;CN=Tami
 Fordham/OU=R10/O=USEPA/C=US@EPA[]; N=David
 Allnutt/OU=R10/O=USEPA/C=US@EPA;CN=Linda Anderson-
 Carnahan/OU=R10/O=USEPA/C=US@EPA;CN=Marcia
 Combes/OU=R10/O=USEPA/C=US@EPA;CN=Mary
 Thiesing/OU=R10/O=USEPA/C=US@EPA;CN=Michael
 Szerlog/OU=R10/O=USEPA/C=US@EPA;CN=Mike
 Bussell/OU=R10/O=USEPA/C=US@EPA;CN=Patricia
 McGrath/OU=R10/O=USEPA/C=US@EPA;CN=Phil North/OU=R10/O=USEPA/C=US@EPA;CN=Richard
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 Combes/OU=R10/O=USEPA/C=US@EPA;CN=Mary
 Thiesing/OU=R10/O=USEPA/C=US@EPA;CN=Michael
 Szerlog/OU=R10/O=USEPA/C=US@EPA;CN=Mike
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 Thomas/OU=R10/O=USEPA/C=US@EPA;CN=Tami Fordham/OU=R10/O=USEPA/C=US@EPA[];
 N=Richard Parkin/OU=R10/O=USEPA/C=US@EPA;CN=Sally
 Thomas/OU=R10/O=USEPA/C=US@EPA;CN=Tami Fordham/OU=R10/O=USEPA/C=US@EPA[];

N=Sally Thomas/OU=R10/O=USEPA/C=US@EPA;CN=Tami
Fordham/OU=R10/O=USEPA/C=US@EPA[]; N=Tami Fordham/OU=R10/O=USEPA/C=US@EPA[]
Cc: []
From: CN=Phil North/OU=R10/O=USEPA/C=US
Sent: Wed 6/30/2010 10:47:06 PM
Subject: Bristol Bay Options Paper
[Bristol Bay Options Paper Final Draft.doc](#)

Attached is the latest version of the options paper for Bristol Bay/Pebble Mine. Ex. 5 - Deliberative
Ex. 5 - Deliberative Ex. 5 - Deliberative If you
have edits to suggest please get them back to me as soon as you can.

The only time the RA is available to discuss the options paper before he visits Bristol Bay is Thursday, July 8 at 11:00AM PST. Most of those on the distribution list for this message are not available at that time.

Phillip North
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"To protect your rivers, protect your mountains."